APPENDIX A.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 11373.

W. P. SEWELL, *Petitioner*,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

R. B. SEWELL, *Petitioner*,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petitions for Review of Decisions of the Tax Court of the United States

(District of Georgia).

(November 9, 1945.)

Before SIBLEY, McCORD, and WALLER, Circuit Judges.

WALLER, Circuit Judge: The question involved here is one of intent, that is, whether or not the petitioners intended to make a completed gift *inter vivos* of the corporate stock to their respective wives, or whether the stock was placed in their wives' names only for tax purposes with the alleged donors retaining the same dominion and control as if there had been no transfer. There are ample facts in the record to justify the factual finding by the Tax Court that the donors merely intended to accomplish the latter purpose. Under *Dobson* vs. *Commissioner of Internal Revenue*, 320 U. S. 489, the findings of fact by the Tax Court should not be disturbed.

The petitioners' motion to remand the case to the Tax Court for consideration by the Tax Court of a declaratory decree of the state court of Georgia rendered since the decision by the Tax Court, in which declaratory decree the state court held that there had been completed gifts of the stock by the petitioners to their wives, is denied. A decision of the state court is binding between the parties in the settlement of their legal rights *inter sese*, but the income tax consequences of such transactions are for the Tax Court. Estoppel, laches, acceptance of benefits, rights of third parties, are incidents that might affect the decisions of the state courts in a contest between the parties, which would have no bearing in a controversy between the parties and the United States over income taxes imposed by virtue of a Federal Statute.

The motion to remand is denied and the case is Affirmed.

APPENDIX B.

Sharp v. *Commissioner*,
91 F. (2d) 802, 803-804

The second question is whether certain items of property were part of the decedent's estate or of a trust estate which he had created. This is determined by a fact finding which the Board has made against the taxpayers. By this we are bound. The question was, however, raised between the estate and the trust estate, and a state court of competent jurisdiction ruled that the property in question belonged to the trust estate. It, of course, follows that this property formed no part of the decedent's estate. We are, however, concerned not with the question of ownership but with a question of tax liability. The ruling is not technically res adjudicata against the taxing authorities because it might well be that as between distributees claiming through a decedent's estate and others claiming through a trust estate the decision might go to the latter, yet the same property might be held to belong to the decedent's estate for tax purposes. This property is taxable.

Sewell v. *Commissioner*,
(R. 269-270)

The petitioners' motion to remand the case to the Tax Court for consideration by the Tax Court of a declaratory decree of the state court of Georgia rendered since the decision by the Tax Court, in which declaratory decree the state court held that there had been completed gifts of the stock by the petitioners to their wives is denied. A decision of the state court is binding between the parties in the settlement of their legal rights inter sese, but the income tax consequences of such transactions are for the Tax Court. Estoppel, laches, acceptance of benefits, rights of third parties, are incidents that might affect the decisions of the state courts in a contest between the parties, which would have no bearing in a controversy between the parties and the United States over income taxes imposed by virtue of a Federal Statute.

(There is here set forth the full opinion in each case on the issue involving the State court judgments.)

APPENDIX C.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 11449.

RUBY ALTA LOGGIE, *Petitioner*,

VERSUS

W. A. THOMAS, Collector of Internal Revenue for the Second Collection District of Texas, *Respondent*.

Appeal from the District Court of the United States for the Northern District of Texas

(December 10, 1945)

Before SIBLEY, McCORD, and WALLER, Circuit Judges.

WALLER, Circuit Judge: The chief question involved in this case is whether or not a declaratory judgment of a state court, rendered after a federal income tax liability had accrued, in a case in which neither the Collector nor the Commissioner of Internal Revenue was a party, is res judicata in a suit in the Federal Court involving such income tax liability.

The income tax consequences to donors or to trustees are not always controlled by the sole incidence of the naked legal title. See Helvering, Commissioner v. Clifford, 309 U. S. 331; Helvering, Commissioner v. Horst, 311 U. S. 112; Harrison v. Schaffner, 312 U. S. 581; Dupont v. Com. Int. Rev., 289 U. S. 685. The fact, therefore, that the state court has rendered a declaratory judgment in reference to the legal title to property as between trustee and cestuis que trust does not foreclose an inquiry as to the liability of the trustee for taxes on the income from the same property involved in the state court judgment. See R. B. Sewell v.

Commissioner of Internal Revenue, decided by this Court on November 9, 1945, and not yet officially reported.

The Appellant still had the power to use and control the income according to her own discretion, and under the applicable decisions she is liable for the tax as held by the Court below.

The judgment is affirmed.

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CITATIONS

682051—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 754

W. P. SEWELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

R. B. SEWELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 52–96) is not officially reported. The opinion of the Circuit Court of Appeals (R. 269–270) is reported at 151 F. 2d 765.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1945. (R. 270.) The petition for a writ of certiorari was filed on January 16, 1946. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The Tax Court decided that purported gifts of income producing property had not relieved the taxpayers from liability for the tax imposed on income by Sections 11 and 22 (a) of the Revenue Acts of 1934 and 1936. In proceedings instituted thereafter, a state court declared that the gifts were valid. The question is whether the Circuit Court of Appeals erred in refusing a remand to the Tax Court for consideration of the action by the state court.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 11. NORMAL TAX ON INDIVIDUALS.
>
> There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.
>
> * * * * *
>
> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * professions, vocations, trades, businesses, commerce,

> * * * or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, * * * dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

The corresponding provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical.

STATEMENT

In the Tax Court the taxpayers [1] contended that they were not taxable on income derived from shares of stock in the Sewell Manufacturing Company,[2] a Georgia corporation, on the ground that they had earlier given those shares to their respective wives. The Tax Court made exhaustive findings (R. 54–65) with regard to the circumstances of the purported gifts, and to the sub-

[1] The Tax Court found the facts in the cases of the present taxpayers together with the facts in the companion case of R. A. Sewell. The cases of the present taxpayers were docketed and decided together in the court below (R. 270), and the case of R. A. Sewell was docketed and decided separately.

[2] The bulk of the income in dispute was in the form of dividends declared by the company on the stock, and credited on its books to the accounts of the wives. (R. 57–58.) The balance consisted of interest credited by the company on dividends allowed to stand on the books of the company in the name of the wife of R. B. Sewell. (R. 73–74.) As the Tax Court held (R. 74), and as the taxpayers have conceded in the court below, identical questions are presented by all items.

sequent dealings by the taxpayers in the subject matter thereof. It found as a fact (R. 64) that—

> None of the stock transfers in question were intended by the * * * [taxpayers] to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name. Completed gifts of the stock certificates so transferred were not made.

By a decision entered on October 11, 1944 (R. 97), the Tax Court sustained the Commissioner's determination that the income in dispute was taxable to the taxpayers. Petitions for review of the decision of the Tax Court were filed in the court below on January 9, 1945. (R. 98, 104.)

In August of 1945, the taxpayers moved in the court below that their cases be remanded to the Tax Court for consideration of decrees rendered by the Superior Court of Haralson County, Georgia, in proceedings instituted in June and July of that year. It appears that the state court proceedings relied upon by both taxpayers are substantially the same for present purposes. We shall, therefore, set forth a summary of that relied upon by W. P. Sewell to illustrate both.

The record of the state court proceedings (R. 199–261) sets forth only pleadings and orders, and

does not include a transcript or statement of the evidence in the state court.

On June 2, 1945, W. P. Sewell assigned to the First National Bank of Atlanta, hereinafter called the bank, as trustee for Mrs. Willie C. Sewell and others,[3] 100 shares of the common capital stock of the Sewell Manufacturing Company. (R. 185, 214) These shares were part of a larger block of 950 shares which, according to his argument in the Tax Court, the taxpayer had given to his wife, Ava F. Sewell, early in 1934. (R. 55.)

On June 21, 1945, the bank brought suit in the state court for a declaratory judgment against the company and the wife of W. P. Sewell. (R. 214–216.) The company asked for judgment that (R. 216)—

> * * * petitioner is the owner of said one hundred (100) shares of stock of Sewell Manufacturing Company; that Sewell Manufacturing Company be directed to issue a certificate for said stock to your petitioner and that it be ordered and adjudicated that Mrs. Ava F. Sewell has no right, title or interest in or to said one hundred (100) shares of stock and that your petitioner have such other and further relief as in the premises are proper.

On July 18, 1945, the wife filed an answer in the state court denying the material allegations of

[3] We have not been informed either as to the relationship of these persons to the taxpayers, or as to the terms of the trust.

the bank's petition, and on the same day the company did likewise. (R. 220–222.) The case went to trial before a jury, and on July 19 the jury returned its verdict (R. 225) that—

> We the Jury find in the issue for the Defendants, Sewell Manufacturing Company, and Mrs. Ava F. Sewell in this case No. 3065.

On the same day the court entered its judgment (R. 225)—

> That the 100 shares of the common capital stock of said Sewell Manufacturing Company described in the petition be and it is hereby declared the property of Mrs. Ava F. Sewell.

On July 19, 1945, the day the state court entered this judgment, W. P. Sewell filed in the same court an answer to a suit for a declaratory judgment commenced by his wife on June 25, 1945, with respect to the balance of the block of 950 shares not involved in the bank's suit. (R. 234–236.) Mrs. Sewell alleged in her petition (R. 227–228) that—

> * * * she is the owner of 850 shares of the common stock of said Sewell Manufacturing Company, and brings this suit in order that this Honorable Court may determine the ownership of said stock and in order that the defendant Sewell Manufacturing Company may know to whom dividends are to be paid in the future and

> who is vested with the right to transfer said stock and in order that the other parties hereto may know to whom said stock belongs and to whom dividends are to be paid, * * *

She prayed (R. 229) for a decree—

> * * * that the petitioner is the owner of said 850 shares of stock of the Sewell Manufacturing Company by virtue of a completed gift of said stock to her in 1934; that said Sewell Manufacturing Company shall pay to petitioner all dividends hereafter declared and to be paid on said stock; that since 1934 the said Warren P. Sewell has had no right, title or interest in or to said 850 shares of stock; * * *

In his answer W. P. Sewell expressly admitted the allegations of the petition and added (R. 234) that when he procured the issuance of the certificate in his wife's name,—

> * * * it was his intention to and he understood that he did then effect a completed gift to her of said 950 shares and that thereafter he retained no interest whatever in any portion of said stock thereafter standing in the name of his wife.

He further stated (R. 235) that—

> * * * in any trial o. this issue this defendant will see that there is placed fully before said court all of the evidence which was before the Tax Court of the United States with reference to the ownership of

> said stock, and all other evidence, if any, of every character which may seem to this defendant to be in any way material to a determination of the question 'Who is the owner of the stock?'

The company filed a similar answer on the same day (R. 232–233), and on August 2, 1945, the state court entered its judgment (R. 239–240).

> * * * (1) that in the year 1934 a legally valid and completed gift without any restriction, condition or reservation was made by the defendant, Warren P. Sewell, to the plaintiff, Mrs. Ava F. Sewell, of 950 shares of stock of the Sewell Manufacturing Company, a Georgia corporation, represented by Certificate No. 42 on the stock records of the Sewell Manufacturing Company, said 950 shares embracing the 850 shares in controversy in this suit; (2) that since 1934 the defendant, Warren P. Sewell, has had no right, title or interest in or to any part of said 850 shares of stock here in controversy; and (3) that said 850 shares of stock here in controversy are the property of the plaintiff, Mrs. Ava F. Sewell.

Similar proceedings were had in the state court involving R. B. Sewell (R. 199–214; 242–261).

The court below sustained the decision of the Tax Court and denied the motions to remand for consideration of the proceedings in the state court (R. 270).

DISCUSSION

The decision below is correct on at least several alternative grounds, none of which involves any present conflict of decisions.

1. Assuming, *arguendo,* that the subsequently entered state court decrees are entitled to full consideration, the decision of the Tax Court remains unaffected thereby. From all that appears from the state court proceedings, they adjudicated no more than that the controverted shares were the "property" of the wives only in a technical legal sense. The Tax Court, however, had found that none of the transfers were intended by the taxpayers "to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name." See *supra,* p. 4. There is no necessary contradiction between that finding of the Tax Court and a finding of the state court that "title" or "property" in the shares was in the wives. Since income under Section 22 (a) is to be determined by realities rather than "technical considerations", the state court decrees may be properly ignored. *Cf. Helvering* v. *Clifford,* 309 U. S. 331, 334, 336; *Commissioner* v. *Harmon,* 323 U. S. 44; *Helvering* v.

Horst, 311 U. S. 112; *Harrison* v. *Schaffner,* 312 U. S. 579.

2. Even if the state court decrees herein should be regarded as inconsistent with the Tax Court's findings, such subsequent decrees are not entitled to consideration. They rest, not upon questions of law, but upon issues of *fact,* and once those issues of fact are determined by the Tax Court, such facts should not be subject to re-examination, as it were, by a state court in proceedings in which the Commissioner is not represented.

The situation where a state court determines issues of *state law* is sharply to be differentiated. Thus, *Blair* v. *Commissioner,* 300 U. S. 5 and *Freuler* v. *Helvering,* 291 U. S. 35, relied upon by petitioners, involved state court judgments determining the legal effect of certain trust instruments. Similarly distinguishable are: *Eisenmenger* v. *Commissioner,* 145 F. 2d 103 (C. C. A. 8); *Hubbell* v. *Helvering,* 70 F. 2d 668 (C. C. A. 8); *Nashville Trust Co.* v. *Commissioner,* 136 F. 2d 148 (C. C. A. 6).[4]

[4] In the *Nashville Trust Co.* case, a federal statute permitting a deduction for claims against a decedent's estate was held to refer to state law, and the Circuit Court of Appeals held that the state court's judgment turned on the application of that law. While we differ with the view of the court that the question whether the claims were contracted for an adequate and full consideration in money or money's worth was controlled by state law, it is nevertheless true that

As the court below pointed out (R. 269), and as the taxpayers concede (Pet. 8), the decisions of the Tax Court and the state court in the present case turned on a question of fact; and as the court below further observed (R. 270), there was reason to believe that the decisions of the state court may even have turned upon events occurring after the tax period, which of course could not serve to expunge tax liability incurred during that period.

Sharp v. *Commissioner,* 303 U. S. 624, is not at variance with the decision below that the Tax Court may not be required to substitute for its own findings of fact a contrary view taken by a state court. Although the Circuit Court of Appeals apparently regarded the question decided by the state court as one of fact (91 F. 2d 802, 803–804), in this Court the taxpayer argued and the Commissioner assumed, that the question actually was one of law. (Petitioner's brief, No. 558, October 1937 Term, p. 10; Respondent's brief, p. 6). This Court apparently made the same assumption, since it disposed of the case by a memorandum opinion which cited only the *Freuler* and *Blair* cases.

Nor does *Helvering* v. *Rhodes' Estate,* 117 F. 2d 509 (C. C. A. 8), represent any present conflict

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the court considered the question to have been referred to state law, and considered the state judgment as turning upon a question of state law.

of applicable principles as between the Eighth Circuit and the court below.[5] In that case, the decision of the Eighth Circuit in affirming the Board of Tax Appeals must be viewed in the light of its subsequent decision in *Doll* v. *Commissioner*, 149 F. 2d 239, 244, fn. 10, certiorari denied, October 8, 1945, No. 138, 1945 Term.[6] Certainly, in the light of the *Doll* case, there is no present conflict of decisions between the two circuits on the issue involved herein. Moreover, in the *Rhodes'* case, the Board of Tax Appeals itself gave effect to a state court decree as to the ownership of property.

3. Although we disagree with petitioners as to the existence of a conflict, we do agree that the issue on the second phase of the case is one of importance, which would benefit by clarification in this Court.

Judgments of state courts are being used with considerable and increasing frequency to challenge determinations of federal tax liability. The decisions by this Court in the *Freuler*, *Blair* and *Sharp* cases, *supra*, do not provide explicit answers to all of the problems which commonly

[5] The precise question in the *Rhodes' Estate* case was whether or not an instrument which on its face made an absolute transfer of certain property to the decedent from her children actually was intended to transfer only a life estate. See *Rhodes* v. *Commissioner*, 41 B. T. A. 62.

[6] The *Doll* case was like the instant case, and unlike the *Rhodes' Estate* case, in that it involved the question of who was taxable under Section 22 (a) of the governing Revenue Acts.

attend such challenges. We believe that a state decision to which the Commissioner was not a party is not entitled to controlling weight in litigation of federal tax liability unless the taxpayer makes a clear affirmative showing of all of the following matters: (1) That Congress has expressly or by necessary implication provided that the incidence of the federal tax shall be determined by reference to state law (*United States* v. *Pelzer,* 312 U. S. 399, 402–403); (2) that the state decision necessarily turns on a rule of state *law* inconsistent with that assumed in the determination of federal tax liability, rather than upon a different view of the facts; and (3) that the circumstances of the state judgment are such as to make it a reliable declaration of the state law.

In the court below we did not discuss the manner in which the state decrees had been obtained, beyond pointing out that the pleadings in the suits of the wives, leading to the only decrees which might conceivably be thought relevant,[7] showed that the parties were in complete agreement on every matter covered by the judgments. (R. 232–235; 239–240; 249–254; 259–260). We suggested in the court below that under *Freuler* v. *Helvering, supra,* p. 45, it might be held that the taxpayers were thereby deprived of standing to

[7] The decree in the suits of the bank established only that the wives had title to the stock in 1945, nearly eight years after the close of the tax period. (R. 212, 225).

ask for a remand to the Tax Court for consideration of the manner in which the judgments had been obtained, but the court below did not reach that question.

CONCLUSION

Although we think there is no conflict of decisions, there is room for clarification as to the binding effect of state court decrees on questions of fact. We think that the *Blair* and related cases have proper scope only where the state court in a genuinely adversary proceeding determines a question of state law, as distinguished from issues of fact, and where the federal tax consequences necessarily turn upon the state law. If the Court were disposed to undertake such clarification we would not oppose the granting of the petition.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
ARNOLD RAUM,
HELEN R. CARLOSS,
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Special Assistants to the Attorney General.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 754.

W. P. SEWELL AND R. B. SEWELL, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY MEMORANDUM FOR PETITIONERS.

The Statement in Respondent's "Memorandum" is more extensive than Petitioner's Statement, and is quite fair. The Memorandum also quite frankly admits the frequency with which State court judgments become material in the determination of Federal tax liability, and Respondent concedes the importance of having this Court make clear the circumstances under which such State court judgments will be accepted as conclusive. It is all the more surprising, therefore, to find the Solicitor General contending, on the ground of tenuous and fallacious arguments, that no conflict exists. This Memorandum is devoted to answering that contention.

1.

The Solicitor General seeks first to show that, even conceding that the State court decrees are entitled to full consideration, the Tax Court judgment would not be affected thereby. To support this thesis, he makes two utterly unauthorized assumptions:

(a) The first unauthorized assumption of the Solicitor General is that the decision of the Tax Court was based on the doctrine of *Helvering* v. *Clifford*, 309 U. S. 331. This argument ignores the fact that the Tax Court decision, both in the Findings of Fact and Opinion, is directed solely to determining whether a valid and completed gift was made by the transfer of the stock, as is clear from the concluding paragraph of the Findings of Fact and the first sentence of the Opinion.

The following paragraph contains the Tax Court's ultimate finding of fact (R. 64):

> "None of the stock transfers in question were intended by the Sewell brothers to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name. *Completed gifts of the stock certificates so transferred were not made.*" (R. 64) (Emphasis supplied)[1]

The Tax Court's Opinion opens with the following sentence (R. 65):

> "Whether the dividends here in question are taxable to the three Sewell brothers or any of them, or to their respective wives, depends upon whether valid and effectual gifts of the stock were made to the wives."

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[1] The Solicitor General in his omission of the last sentence of the findings from his quotation on Page 9 of his Memorandum entirely overlooks the fact that this is the most significant sentence of the Tax Court's Finding.

The authorities cited by the Tax Court relate exclusively to the essentials of a valid and completed gift. The second case cited by the Tax Court, *Allen-West Commission Co.* v. *Grumbles,* 129 Fed. 287 (C. C. A. 8th), was decided in 1904. The circumstances referred to by the Tax Court as indicating retention of dominion and control by the husband were relied upon solely as evidence of a lack of the donative intent necessary to a valid gift. Nowhere in its Findings or Opinion is there the slightest suggestion that under Sections 11 and 22(a) of the Revenue Acts of 1934 and 1936 the income would remain taxable to the husband if a valid and completed gift had been made. There was no suggestion of reliance upon any cases like the *Clifford, Horst, Schaffner* and *Harmon* cases cited by the Solicitor General (Govt. Memo., pp. 9-10). The idea that any question was considered by the Tax Court other than whether a gift valid under state law had been made is purely imaginative.

(b) The second unauthorized assumption of the Solicitor General is that the State court decree determines merely that the stock was "the 'property' of the wives only in a technical legal sense." The record shows no basis whatever for such an assumption. The State court judgment in each case clearly determined that every right which the husband had in the stock was transferred to the wife.[2]

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[2] The judgment in the suit by Mrs. Ava F. (W. P.) Sewell for a declaratory judgment, for example, decreed (R. 240):

> "It is hereby Ordered, Adjudged and Decreed (1) that in the year 1934 a legally valid and completed gift without any restriction, condition or reservation was made by the defendant, Warren P. Sewell, to the plaintiff, Mrs. Ava F. Sewell, of 950 shares of stock of the Sewell Manufacturing Company, a Georgia corporation, represented by Certificate No. 42 on the stock records of the Sewell Manufacturing Company, said 950 shares embracing the 850 shares in controversy in this suit; (2) that since 1934 the defendant, Warren P. Sewell, has had no right, title or interest in or to any part of said 850 shares of stock here in controversy; and (3) that said 850 shares of stock here in controversy are the property of the plaintiff, Mrs. Ava F. Sewell."

2.

The Solicitor General then urges that, conceding that the judgment of the State court is inconsistent with the Tax Court decree, the circumstance that the State court decree here denied effect involved an issue of fact, prevents the decision of the court below in the present case from being in conflict with the decisions of this Court or of any other Circuit. (Govt. Memo., pp. 10-12). In the Petition it had been pointed out that if any such narrow distinction should be appropriate, there would nevertheless remain a clear conflict between the decision of the court below and decisions in the Eighth and Sixth Circuits, respectively, in the cases of *Rhodes' Estate* v. *Helvering*, 117 F. (2d) 509 (C. C. A. 8th), and *Nashville Trust Co.* v. *Commissioner*, 136 F. (2d) 148 (C. C. A., 6th).

The *Rhodes' Estate* case, *supra*, clearly involved a question of fact,[3] and in that case the Government unsuccessfully urged upon the Eighth Circuit Court of Appeals the same distinction between law and fact relied upon here. To avoid the admission of a present conflict between the case at bar and the *Rhodes' Estate* case, the Solicitor General makes the unfounded suggestion that the *Rhodes' Estate* case has been in effect discredited by the case of *Doll* v. *Commissioner*, 149 F. (2d) 239 (C. C. A., 8th). Actually, the *Doll* case casts no doubt whatever upon the *Rhodes' Estate* case. In the *Doll* case, the Eighth Circuit Court of Appeals did not question the binding effect of the State court decree holding that there was a valid and legal partnership between husband and wife, but simply held that

[3] The State court judgment there involved was a judgment in reformation of an instrument executed ten years prior to the judgment, which instrument clearly purported on its face to convey a fee interest of four-fifths of an estate from children to their mother. The State court decree had reformed the instrument so that it conveyed only a life interest. The State court decree was entered on the strength of oral testimony as to the intention of the parties and as to the mistake of the scrivener. Intention is clearly and admittedly a quesion of fact.

where the income arose from the personal services of the husband, the husband must pay the income tax thereon regardless of the existence of a partnership. The *Rhodes' Estate* case was mentioned only once in the *Doll* case and than in a footnote where it was pointed out that the *Freuler, Blair, Rhodes' Estate* and related cases had no bearing on the question there involved. (149 F. (2d) 239, 244, Footnote 11). Therefore, the decision of the Eighth Circuit Court of Appeals in the *Doll* case leaves completely unaffected its earlier decision in the *Rhodes Estate* case.

The suggestion of the Solicitor General that the State court judgment held controlling by the Sixth Circuit in the case of *Nashville Trust Co. v. Commissioner*, 136 F. (2d) 148, did not turn upon any question of fact, but only upon a question of State law, is without any foundation. The State court judgment there presented, as construed by the Circuit Court of Appeals, determined two questions: (1) that the legacies in question were not gifts but compensations for services, and (2) that the fair value of the services was equal to the value of the legacies—both primarily questions of fact.

It is clearly demonstrated that even if a narrow distinction between fact and law is proper in this field there is clear conflict between the judgment below and the *Rhodes' Estate* and *Nashville Trust Co.* cases. If space permitted, we believe that it could be shown that in the case of *Eisenmenger* v. *Commissioner*, 145 F. (2d) 103 (C. C. A., 8th), and in *Sharp* v. *Commissioner*, 303 U. S. 624, the judgment of the State court depended not entirely upon legal interpretation of written instruments alone, but involved consideration by the State court of evidence as to questions of fact.

Respectfully submitted,

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Wilton H. Wallace,
W. A. Sutherland,
Counsel for Petitioner.